Office - Supreme Court, U.S
FILED
FEB 3 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM GOUVEIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT WILLIAM GOUVEIA

MICHAEL J. TREMAN
105 E. De La Guerra #5
Santa Barbara, CA 93101
(805) 963-3569, 962-6544
Court-appointed Counsel for Respondent
WILLIAM GOUVEIA

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

I. DOES THE SIXTH AMENDMENT ESTABLISH A BASIS FOR GRANTING AN INDIGENT PRISON INMATE THE RIGHT TO COUNSEL WHEN HE IS BEING HELD IN ADMINISTRATIVE DETENTION PENDING INVESTIGATION AND TRIAL FOR HAVING COMMITTED A FELONY?

II. DOES THE DEPRIVATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL FOR A PRISON INMATE NECESSARILY LEAD TO THE DISMISSAL OF THE INDICTMENT?

TABLE OF CONTENTS

TABLE OF CITATIONS

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 704 F.2d 1116 (9th Cir. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1983. The petition for writ of certiorari was filed by the Government on July 25, 1983 and was granted on October 17, 1983. The jurisdiction of the court rests on 28 USC § 1254(1).

CONSTITUTIONAL PROVISION

The Sixth Amendment provides, in pertinent part: In all criminal prosecution, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT

A. William Gouveia was sentenced on April 23, 1981 to life imprisonment on Count II and to ninety-nine (99) years with a thirty-three (33) year minimum on Count I of a six count Indictment filed June 17, 1980 in the United States District Court for the Central District of California. His sentence followed two trials, the first of which begain September 9, 1980. The first trial resulted in a mistrial due to the jury's inability to reach a unanimous verdict.

Mr. Gouveia was charged in two of the six counts. In Count I he was charged with conspiracy to murder Thomas Trejo and to convey from place to place within the institution knives to kill him. It was specifically alleged in the first count that Mr. Gouveia and Steven Kinard conspired to and did dispose of the knives used to murder

Thomas Trejo. In Count II he was charged with aiding and abetting others in the actual murder.

B. The Brief for the United States makes several factual misstatements concerning what transpired in the relevant history of the case as to Mr. Gouveia. The most significant error is in the allegation that Mr. Gouveia was removed from ADU and returned to the general prison population (Brief, p. 3). Mr. Gouveia's declaration in support of the motion to dismiss in the district court establishes that he did not return to the general prison population until March of 1979 and then it was a different institution. (J.A. 44). The Incident Report of December 13, 1978 confirms these facts where it states "Inmate Gouveia was placed in I-Unit on November 11, 1978 pending investigation by both the FBI and the Investigative Supervisor. Investigation completed this date (13 Dec 78) and now referred to the unit team for disposition." (J.A. 49). [See Argument in trial court at J.A. 89].

The Brief also states that following the murder the Federal Bureau of Investigation and prison officials began "independent" investigations. In their response to a Request for Administrative Remedy filed by Mr. Gouveia on December 29, 1978 the Bureau of Prisons, in the person of Regional Director Toft, states, "On 11/11/78 an incident report for codes 002, Assault code 202, possession of a Sharpened Instrument and code 801, Aiding and Abetting in the Commission of (A)ny of the (A)bove (O)ffenses was written on you for your suspected involvement in the death of another inmate at FCI, Lompoc. The incident was referred to the F.B.I. for investigation and possible criminal prosecutioin. After completion of F.B.I. interviews . . . you were given the incident report referencing the above charges on 12/13/78." (Copies of this document are part of U.S. Bureau of Prisons central

file for Mr. Gouveia). Similarly, the Brief implies that the United States Attorney's Office was not involved in the case until March of 1979 (p.4), while in fact they were advised of the fact that Mr. Gouveia was suspected as a murderer of Mr. Trejo on November 29, 1978. At that time they opened a file and an assistant was assigned for the investigation. (J.A. 50). The United States Attorney's Office began receiving written material on January 2, 1979. (J.A. 51).

C. On Saturday, November 11, 1978, Thomas "Hoppo" Trejo was killed as a result of forty-five (45) stab wounds. (R.T. 149).[1] The murder took place in Cell A-18 of M Unit at the Federal Correctional Institution at Lompoc, California. (R.T. 318-319).

Steven Kinard, an inmate of the Lompoc institution at the time of the murder, was the main witness at both trials. Kinard had originally been indicted along with the other defendants for the murder of Thomas Trejo. In September of 1980, after the indictment was handed down, Kinard offered to testify for the Government. As part of the subsequent plea bargain, the Government dropped the conspiracy and murder counts and allowed Kinard to plead to the lessor charge of conveying a weapon within the prison. (R.T. 569-580, 562-563).

Kinard testified to conversations among the defendants and other inmates in which they conspired to murder Thomas Trejo. (R.T. 488-533). He also testified to the arrangements that were made to obtain three knives and to his own assistance in the transportation of these knives both before and after the murder.

---

[1] "R.T." signifies the reporter's transcript of the retrial in the case of the Gouveia respondents.

According to Kinard's testimony, sometime after 11:00 a.m. on the day of the murder, the defendants and other inmates met in the gym corridor. The knives were retrieved from their hiding places and defendant Ramirez was sent to bring Trejo to M Unit where they planned to kill him. Kinard then went to his cell to wait. (R.T. 516-533). Approximately twenty (20) minutes later, defendant Gouveia called Kinard from his cell to help dispose of the knives, (R.T. 533-535). Kinard testified that he cleaned the knives and then gave them to Gouveia and Willard "B.T." Taylor, another inmate who also testified for the Government. (R.T. 536-558).

Willard "B.T." Taylor also testified to the disposal of the knives. His testimony differed from Kinard's in that Taylor alleged that Kinard, not Gouveia, asked him to get rid of the knives. (R.T. 874-875). Taylor testified to hiding the knives in the restroom of the second floor of E Unit. (R.T. 879).

Another inmate, Gene Newby, testified to seeing the defendants enter the cell of a friend, "Chavetes," around noon on November 11. Newby remembered seeing "Champ" Reynoso and "Black" Segura tear a bundle of clothes into strips and flush them down the toilet. (R.T. 1011-1017).

Other testimony established that a piece of writing paper was found at the scene of the murder and that defendant Gouveia's palmprint and a fingerprint were found on the paper. (R.T. 443-449).

Defendant Gouveia denied any involvement in the Trejo murder. (R.T. 2362-2363). He testified that on the morning of November 11, 1978, he worked out by himself at the weight pile in the yard until around 9:30 a.m. and then went to brunch. (R.T. 2370-2371). He then walked

around the track along with approximately fifty (50) other inmates. (R.T. 2372). Afterwards, he looked around the gym and returned to his unit for about an hour. He then went to the one o'clock movie for approximately twenty (20) minutes, went to the gym for a short time and then returned to his unit. (R.T. 2372-2372; 2375, 2378-2379). Respondent tried to produce several inmate witnesses to corroborate his testimony. (R.T. 1548-1549, 1844-1845, 1652, 1679, 1681, 2118-2121).

Inmate Tony Estrada also testified to seeing an exchange of knives between Michael "Flappers" Thompson and B.T. Taylor in K Unit shortly before 1:00 p.m. on November 11, 1978. (R.T. 1854-1860). This was the same time frame to which B.T. Taylor testified that the exchange of knives between Kinard and Taylor took place. (R.T. 874-875).

D. Respondent Gouveia arrived at the Federal Correctional Institute at Lompoc in October 1978. In the evening of November 11, 1978 he was locked down and placed in isolation pending the investigation of the murder of Thomas Trejo. (R.T. 2380). Mr. Gouveia never again returned to the general prisoner population at Lompoc. He remained in isolation throughout remainder of his stay at Lompoc and thereafter at other institutions until March 1979. (J.A. 44). During his isolation at Lompoc he was interviewed once by the F.B.I. on Demceber 6, 1978. He was read his rights as if he were an accused in a criminal case, and then was interviewed concerning his knowledge of the Trejo murder. (J.A. 54, 54). Although he requested assistance of counsel at the administrative hearing, no counsel was provided preindictment.

During the preindictment period the Government, in the form of the F.B.I., interviewed over 100 inmates at

least once, several inmates more than once. [R.T. (first trial), Vol. B, 127]. The Government even took the time to interview some inmates away from the prison environment so that they might speak more freely. [R.T. (first trial), Vol. B, 128]. In addition, the information obtained from these interviews was memorialized in reports systematically made by the F.B.I. agents. (R.T. 2251-2522).

Prior to the first trial in this case, respondent Gouveia filed a motion to dismiss the indictment based on Sixth Amendment right to counsel and speedy trial arguments, and Fifth Amendment denial of due process. (Clerk's Transcript, p. 67). This motion was renewed prior to the second trial. (Clerk's Transcript, p. 118). In both instances, the motion was denied.

At trial the prejudicial effects of defendant Gouveia's inability to interview witnesses and memorialize their testimony during the lengthy preindictment delay became apparent with each witness' testimony. The transcript is replete with examples of witnesses who were forced to rely on habit evidence in order to answer counsel's questions as opposed to being able to remember the specific events of November 11, 1978. [Some examples: R.T. 1654:2-25; 1655:2-17, 1729, 1733, 1737:16-23, 1864-1866, 1969, 2127:11-17, 2136-2244]. Other witnesses simply could not remember specific facts of any kind. [Some examples from the First Trial: testimony of Tony Estrada, J.A. 114; Raymond Olvera, J.A. 98; William Gouveia, J.A. 108; Stephen Broughton, J.A. 102, Paul L. Allen, J.A. 106, Antonio Palacios, J.A. 93. From the Second Trial: R.T. 2122, 1654:2-25, 1655:2-17, 2379:6-15].

The erosive effect of the extensive delay was exacerbated by the fact that the murder took place within a relatively short period of time, approximately twenty

minutes. (R.T. 533-534). Even evidence of the conspiracy consisted of conversations that took place intermittently during the morning hours of November 11th, and a few sporadic conversations that took place prior to that date. The faded memories of witnesses contacted by the defense counsel over two years after the happening of the event were only of limited assistance in accounting for the whereabouts of respondent Gouveia at specific periods of time.

In addition to the prejudicial effects of the loss of memory of witnesses, the defense also lost two important witnesses entirely. By the time defendant Gouveia and his codefendants were indicted in June of 1980, and defense counsel was finally appointed, Richard Recendez, one of the alleged participants in the murder conspiracy according to the testimony of government witness Kinard, had died. (R.T. 739). Also, Michael "Flappers" Thompson had died before the indictment was handed down. Mr. Thompson was an important character in the defense version of the Trejo murder. (R.T. 2228). The defense tried to show that Kinard and Thompson had actually committed the murder with help from B.T. Taylor and then told other inmates that a group of Mexicans had been charged with the murder they committed.

The defense faced a wide variety of other problems due to the lengthy preindictment delay. For instance, the murder took place in a cell in M Unit. The front door of this cell consisted of bars which could be seen through by any of the inhabitants of M Unit. (R.T. 2339). It is conceivable that somebody in M Unit may have seen or heard something related to the actual murder. Yet when defense counsel tried to locate those people who were prisoners in M Unit on November 11, 1978, they discovered that 62 of the 67 prisoners who were there on that date

were no longer in Lompoc in 1980. (J.A. 90). While the Government had had almost two years to track down these prisoners and may in fact have interviewed them within a few days of the murder, defense counsel had only a matter of a few weeks to track down these prisoners and cut through the Bureau of Prisons' red tape. (J.A. 90). There was no substitute for the defense being able to interview these prisoners themselves. A defense attorney would have a different viewpoint than a prison official or F.B.I. investigator. He might have uncovered evidence that could assist in the presention of the defense. Yet this source of witnesses had for all practical purposes disappeared by the time defense counsel were appointed.

SUMMARY OF ARGUMENT

The issue as framed by the court of appeals was "whether the isolation of appellants (respondents herein) in administrative detention pending investigation and trial obligated prison officials to provide counsel at any time prior to appellants' indictment." In rendering its opinion that court noted that for prison crimes the governmental interests that dictate the isolation of suspects do not lead to an arrest, nor prompt the early initiation of formal judicial proceedings, but rather cause the isolation of suspected inmates in administrative detention for what can be an indeterminate period. Furthermore, the position of an inmate being held in administrative segregation pending investigation of his crimes is more akin to that of a suspect outside prison who has been arrested than that of a suspect outside prison who has not yet been arrested. In the case of the former, the arrest forces the intitiation of formal judicial proceedings or the release of the detainee, while there are no comparable rules in the prison setting. Therefore, in some circumstances the act of administrative detention will constitute sufficient "accusation" to give rise to the right to appointed counsel. The

appeals court then went on to establish rules and guidelines under which an inmate can establish that he is being held in segregation for investigation of a felony. Once the inmate has established these points at a prima facia level, it is up to the Government to refute them, provide counsel or cease the segregation.

1. Respondent Gouveia was placed in administrative segregation on November 11, 1978 because he was suspected of being involved in the death of another inmate in the Lompoc institution. The matter was referred to the F.B.I. for investigation. Their report was referred to the institution on December 13, 1978. On the same date the Government first provided Mr. Gouveia with copies of the Incident Report thereby advising him of the charges. (J.A. 48). Respondent then appeared before the Unit Discipline Committee which in turn referred the matter to the Institution Discipline Committee. On December 21, 1978 respondent Gouveia appeared before the I.D.C., was found "guilty" of assault (code 002), and aiding and abetting in the commission of the offense (code 801). He was disciplined by the loss of good time. He remained in segregation until he was released to the general prison population in Leavenworth, Kansas in March of 1979.

The court of appeals held that in the case of an indigent prison inmate who is placed in administrative segregation pending investigation of a crime, that there was a limit as to how long that inmate could be held for that purpose without providing him counsel pursuant to his request. Their decision properly recognized that under the system as it existed in 1978 the Government, both in the form of the prosecutors, their investigative agents and the Bureau of Prisons, had the unabridged ability to prevent a suspected felon from taking steps to secure the means of his defense by locating and preserving witnesses. The

requirement to provide counsel, as fashioned by the court of appeals, struck a balance between the needs of the Bureau of Prisons to be able to protect inmates and control the prison population, while providing the inmate suspect with real means to effect the constitutionally guaranteed right to defend himself.

2. The arguments asserted by the Government in its brief in seeking a reversal of the Ninth Circuit opinion resolve themselves into two basic points on the subject of an appropriate remedy. The first concerns what standard is to be applied in determining an appropriate remedy, where there is a finding of a denial of a Sixth Amendment right to counsel, for a prison inmate who has been placed in administrative segregation pending investigation for criminal charges. The second argument is that the record in this case does not establish "demonstrable prejudice or substantial threat thereof," which is the standard they suggest should be applied based upon *United States* v. *Morrison*, 449 U.S. 361 (1981).

The court of appeals took the position that in a case, where their standards for the right to counsel are met, the Government conduct has rendered counsel's assistance to respondents ineffective and the resulting harm is not capable of after the fact remedy. (Pet. App. 21a). Going further, the court considered that for inmates, such as respondent, it will ordinarily be impossible to adequately prove or disprove the existence of prejudice. In addition, the record disclosed that "substantial prejudice" may have occurred. (Pet. App. 22a).

In the case of respondent Gouveia, the record discloses that the Governemnt's case against him consisted of testimony which sought to place him in the presence of the co-defendants during conversations which were to constitute the conspiracy and he was directly involved in the

disposal of knives after the murder. In order to refute this type of case it would be necessary to produce witnesses to establish that he was at locations other than as contended by the Government during the time those conversations took place. Where counsel is provided some twenty (20) months after the event, it would require going back to the records in order to try and establish who should have been there. Thereafter, those people would have to be located and interviewed. It would also necessitate that those people, once located, would have had some reason to remember who they did, or for that matter did not, see at a particular time and place in circumstances which at the time would have had no particular significance to them. In the setting of a prison system, it is doubtful that anyone would seriously suggest that this type of defense could be accomplished given the length of the delay. The trial transcript demonstrates that to the extent that defense counsel was able to find any witnesses at all, they were weak even in their ability to recall their own actions on the day in question, let alone those of someone else. Furthermore, in some cases, obviously critical information was just unavailable, as were certain witnesses. Therefore, it becomes unrealistic to expect that either party can prove or refute the existence of actual prejudice and fairness requires that the Government bear the burden of its conduct and the only available remedy is dismissal of the Indictment.

ARGUMENT

I

DOES THE SIXTH AMENDMENT ESTABLISH A BASIS FOR GRANTING AN INDIGENT PRISON INMATE THE RIGHT TO COUNSEL WHEN HE IS BEING HELD IN ADMINISTRATIVE DETENTION PENDING INVESTIGATION AND TRIAL FOR HAVING COMMITTED A FELONY?

A. The Granting Of Counsel To A Prison Inmate In These Circumstances Is Required Under The Sixth Amendment As Necessary To Preserve Equality In Our Adversary System.

The position of the Government in its brief before this court and that of the court of appeals as stated in its opinion are very similar in their recognition that administrative detention by prison officials is a legitimate activity, which is necessary for the safe and proper administration of the Federal Prison System.[2] Similarly, there is no issue as to the fact that as a "substantial deprivation of liberty" there are certain limitations upon its use and application. *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (Doughlas, J. dissenting); *Hewitt* v. *Helms* 103 S.Ct. 864 (1983). Therefore, Government arguments notwithstanding, the issue in this case is not whether such detentions are appropriate or authorized or even whether they constitute an "adversary judicial proceeding." Rather, it is a question of how to even up the respective adversary positions between the suspect and the prosecuting Government, when administrative segregation is being used to isolate an inmate "pending investigation or trial for criminal act." 28 C.F.R. 541.20(a)(3) (1982).

---

[2] Appellants in the court of appeals (respondents herein) did not challenge the legitimacy of administrative detention in general, nor do they do so before this court.

In the case of respondent Gouveia, he was isolated from the prison population at approximately 8:00 p.m. on November 11, 1978. He received a memo stating that this action was done pending investigation or trial for crimes committed in the institution. It was not until December 13, 1978, that a formal Incident Report was delivered to him. At that time he was advised of the charges against him.[3] Thereafter, the Government refused his requests for the assistance of counsel on the grounds that he did not have a right to one. [*Wolff* v. *McDonnell*, *supra*, 418 U.S. at 570]. After adjudging respondent "guilty" at a proceeding in which he was not apprised of the identity of his accusers due to the "confidential" nature of the information, the Government continued to hold him in segregation, and in the process moved him from one institution to another. He eventually surfaced in the federal prison population in Leavenworth, Kansas in March 1979. (J.A. 44-47). During the period of his administrative segregation, respondent had no legitimate access[4] to the general prison population at Lompoc, his access to the outside world was curtailed, (during the period of time he was in transit it was eliminated), and his life was placed in jeopardy as a potential government informer. (J.A. 45-46).

---

[3] Gouveia was interviewed by the F.B.I. on December 6, 1978 at which time he was advised of his *Miranda* rights, in the same manner as if he was undergoing a "custodial interrogation." (J.A. 53). This was apparently the first time that he had any opportunity to do anything about his detention. (J.A. 45).

[4] The Government suggests in its Brief that an inmate in segregation can conduct his own investigation through the "grapevine," windows, vents or while exercising his limited visitation with family. (Brief, p. 39). Assuming that such a suggestion has any practical sense, it seems uncanny that the Government is now suggesting that the prison regulations and procedures governing limited access to inmates in segregation should be circumvented by a suspect to try and preserve a defense.

In contrast, the Government had more than three trained investigators in the form of F.B.I. agents undertaking to interview over 100 inmates beginning November 11, 1978. The United States Attorney's Office had a file open and an assistant assigned to the investigation by November 29, 1978.[5] (J.A. 50). The initial F.B.I. investigative report accusing respondent was returned to the institution on December 13, 1978. However, respondent had no ability to begin his own investigation, even in the form of memorializing the testimony of favorable witnesses, until he was released from segregation and of course at that time he was at a different institution.[6] It was not until some 20 months after his initial lock down that he had counsel.

Speaking for the majority of this court, Mr. Justice Blackmun had the occasion to discuss the application of the Sixth Amendment right to counsel in the context of witness interviews in the case of *United States* v. *Ash*, 413 U.S. 300. Therein he indicated that this court would be unwilling to extend the right to counsel to a portion of the prosecutor's trial-preparation interviews with wit-

---

[5] The assistant assigned, Bert H. Deixler, handled the case through to and including the first trial.

[6] There is nothing in the record to suggest that the Government made any attempt to interview the witnesses whose names they received from respondent in his F.B.I. interview. The assertion by the Government that a prisoner can use such a procedure to identify and memoralize witnesses and evidence, assumes that the suspect is given information in sufficient detail about the factual basis for the charges to enable him to specifically designate what should be done on his behalf. In this case, that information was withheld in the interests of confidentiality. Respondent was therefore limited to trying to recall, almost a month after lock down, who he saw and what he did over the period of an entire day. His difficulty in this regard was increased by the fact that he was a recent arrival at the institution.

nesses. He recognized that in England in the 16th and 17th centuries counsel regularly interviewed witnesses before trial and that "The traditional counterbalance in the American adversary system for these interviews arises from the *equal ability* of defense counsel to seek and interview witnesses himself." (At p. 318) [Emphasis added]. This "equal ability," or in the case of the prison inmate in segregation, the lack of it, is the cornerstone of the court of appeals' opinion. The application of the Sixth Amendment right in this circumstance is directly to minimize the imbalance in the adversary system that results in these cases when the Government is free to pursue its investigation and the development of a case against a suspect who is prevented by the same government from doing so on his own behalf. [See also *Johnson* v. *Zerbst*, 304 U.S. 458 (1938)].

In a portion of its brief the Government has argued that a court that evaluates prejudice from the lack of appointed counsel during administrative detention should consider several factors, including the opportunities for the preservation of evidence afforded by the prison disciplinary proceedings, the amount of time that a defendant spends in the general prison population after the offense occurs, and the information the defendant's counsel receives in the form of inmate rosters and other inmate identification information. Respondent contends that consideration of these factors in his case demonstrates the need for counsel in order to "even up" the opportunity to defend himself at the time of trial.

In respondent's circumstances, he was locked down on the evening of November 11th and remained in that status until removed from the institution. (J.A. 44-47). He did not have the opportunity to preserve evidence or memorialize testimony at the disciplinary proceedings because they did not take place until more than 30 days

after his lock down and then he was not provided with the specifics of the accusations because they were "confidential." (J.A. 45). In the meantime the Government had three F.B.I. agents interviewing more than 100 witnesses at least once and in some cases more than once. (J.A. 50). Once respondent was removed from the institution he remained in isolation until March of 1979, when he was relased to the general population in Leavenworth. (J.A. 46). In his absence, the Government was able to continue its investigative process uninhibited. Respondent was unable to being preparation of his defense post indictment when counsel was appointed.

Counsel for respondent was provided with a list of inmates for various units in the facility, but the process of turning that into usable information was cumbersome and inaccurate. In order to find the present location of inmates it was necessary to send written requests to the Bureau of Prisons locator who in turn responded in writing. Thereafter, it was necessary to telephone various institutions or parole offices in order to establish a final location for various individuals. In the course of following this process it became apparent that the information on the lists provided by the Government was inaccurate. Rickey Resendez, who was identified by respondent in his F.B.I. interview, was not locatable using this method. (It turned out that Mr. Resendez died prior to the time of the indictment.) A "Macias" appeared on the M Unit housing lists (J.A. 70-75), but not on the M roster (J.A. 76-77). Mr. Trejo's name did not appear anywhere and the prison locator had respondent Gouveia as being released from Leavenworth, Kansas on September 24, 1979. (J.A. 63-69). Under these circumstances it is hard to conclude that counsel for respondent, once he was appointed, was in any way in a comparable position to government coun-

sel, Mr. Deixler, once he was assigned to the investigation on November 29, 1978.

At least for these respondents, it appears that the traditional counterbalance in the American adversary system which comes from an accused having counsel who has an equal ability to seek and interview witnesses was missing. Absent such an ability in prison inmate cases, then it is hard to support the position that the subsequent appointment of counsel after indictment will result in effective representation and a fair trial.

B. The Providing Of Counsel Under The Circumstances Set Out By The Court Of Appeals Is Reasonable In Relation To The Needs Of The Bureau Of Prisons And The Inmate Suspect.

A portion of the Government's argument before this court is based upon an analysis of the Sixth Amendment in the context of a specific event, i.e., the initiation of adversary judicial proceedings through formal charge. (Brief, p. 21). Clearly, even the Government recognizes that it is the circumstances which bring the right to bear, not the formalism of an event. These circumstances have been called a "critical stage" in such cases as *United States* v. *Ash*, *supra*, 413 U.S. 300; *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (plurality opinion); *United States* v. *Wade*, 388 U.S. 218 (1967).

The court of appeals established in this case a fairly rigid set of circumstances as evidencing that a "critical stage" had been reached in the case of a prison inmate. First, the inmate must be held for more than the ninety (90) day isolation period permitted under the Bureau of Prisons' regulations. Second, the inmate must ask for an attorney. Third, the inmate must establish indigency. Fourth, the inmate must make a prima facia showing that one of the reasons for his continued detention is the

investigation of a felony. Furthermore, even if these facts are established, there is no automatic right to counsel. Rather, the Government has several choices, only one of which is to provide counsel. Significantly, if the Government can establish that the detention is not for the investigation of a felony, then there is no need for it to do anything. Similarly, if the inmate is being held in connection with the investigation of a felony, he can be released back to the general prison population. It is only when the Government seeks to keep a suspect in isolation while it continues its investigation that it must provide counsel to the indigent inmate who requests it.

The remedy fashioned by the appellate court directly and rationally meets the needs of both the Government and the suspect. In the case of respondent Gouveia, the appointment of counsel would have enabled him to have witnesses located and evidence memorialized against possible loss, without disrupting the Government's decision to move him physically to another institution. At this juncture the burden upon the Government would have been slight. Presumably, their investigation would be substantially completed, their witnesses located, statements taken and the physical evidence analyzed. A suspect's investigation through counsel would minimize the risk of coercion or harm to inmate witnesses.[7]

It would also be expected that an investigation by counsel would be guided by a knowledge of the legal

---

[7] The Government has suggested in its Brief that one reason not to appoint counsel is because of the risk of coercion and retribution. (Brief, p. 28). This argument assumes that the kind of general investigation to locate witnesses and memoralize testimony, which respondent was prevented from doing in this case, would somehow generate these evils which the Government seeks to prevent. Furth-

issues and evidentiary requirements attendant upon a criminal trial. An inmate who attempts to conduct his own investigation from within the confines of segregation does not have access to the prison library or other sources from which he can gain an understanding of the legal ramifications of the steps involved in locating and preserving evidence, including statements. Under the alternatives set out by the appellate court, the inmate returned to the general population could acquire that technical knowledge from sources within the institution, or, if not returned, the appointed counsel would be provided the requisite knowledge. While it is true that one might say it would be to the inmate's advantage to remain in segregation and have counsel appointed, factually, the inmate's situation under the court of appeals decision would be analogous to that of an indigent suspect who had not yet been arrested. Until the time of his arrest, a suspect is left to his own resources, but without Government restriction. Once the arrest occurs (i.e., when the Government begins to restrict his movement) he must be brought before a magistrate and at that time counsel is appointed to provide the necessary legal expertise.

The significance of the presence of counsel to preserve evidence and witnesses for submission during trial should not be minimized in cases such as these involving prison inmates. One of the witnesses respondent brought forth at the first trial was barely able to testify because of the objections of Government counsel Deixler based upon the

---

ermore, it ignores the fact that a trial is supposed to be a search for the truth and that it is not uncommon for Government inmate witnesses to commit perjury in exchange for favors, such as a reduced sentence. Finally, it is noteworthy that in respondent's case there was no effort by the Government to justify the twenty (20) month delay on any basis related to the protection of witnesses.

witness' inability, almost two years later, to recall exactly when certain information came to his attention. The witness Tony Estrada was called because of conversations he had with "Flappers" concerning disposal of some knives. In upholding the Government's objections, the trial judge said: ". . . but I think that Mr. Deixler has put his finger on it; that we don't know when he received the information. If you can establish that the information he received was on the day of the murder, then I think you have laid your foundation, but at the present time, I don't believe you have laid that foundation." (J.A. 115). If counsel had been able to interview this witness closer to the time of the events in question, then a memorandum of that interview could have been used to refresh the witness' memory of dates and times, information which counsel would know was necessary to lay the foundation for the testimony. Significantly, during the course of the trial the Government was able to use that same evidentiary tool for its witnesses and to impeach defense witnesses. (J.A. 100).

II

DOES THE DEPRIVATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL FOR A PRISON INMATE NECESSARILY LEAD TO THE DISMISSAL OF THE INDICTMENT?

A. Dismissal Of The Indictment Is The Only Remedy Available To Neutralize The Prejudice Suffered By Respondents.

This court has indicated that the correct approach to fashion a remedy for Sixth Amendment deprivations is to identify the taint and devise a remedy to neutralize the prejudice so suffered so that the defendant is assured of a fair trial. *U.S.* v. *Morrison*, *supra*, at p. 365. In this case, by definition, the respondents were being held in admin-

istrative segregation in excess of ninety (90) days for the purpose of investigation of a felony. They were indigent and although they requested the assistance of counsel, counsel was denied them. The taint recognized by the court of appeals was that without the assistance of counsel their ability to defend themselves at trial was handicapped. (Pet. App. 20a). Under these circumstances, what remedy could neutralize a twenty (20) month delay?

The pretrial discovery disclosed that in the cell where the murder took place there was a brown paper bag containing the name "Sanchez." The bag also had two palm prints which were analyzed by the F.B.I., but could not be correlated to the respondents nor the then inhabitant of the cell, Mr. Macias. (R.T. 461-465). Part of the Government's case against respondent Gouveia included the introduction of finger print and palm print evidence which was located on a piece of paper found in the cell. The trial testimony established that the prints were placed on the paper prior to the murder, but the inmate to whom the cell was assigned denied any knowledge of it. (R.T. 830). There was also evidence of numerous other prints on a Playboy magazine located in the cell, which did not correlate to any of the respondents. (Macias denied any knowledge of the magazine, as well.) (R.T. 836) It was obviously to respondents' advantage to show that prints on movable items in the cell, such as the bag, the paper, and the magazine, did not necessarily indicate involvement in the murder, or placement at the time of the murder.[8] Presumably this could be accomplished by

[8] In respondent Gouveia's case, he was able to establish the placement of the prints as a pre-murder because the paper contained blood drops which were on top of the prints and were undisturbed. If the prints had been placed on the paper during or after the murder, the prints would have made an impression in the blood (R.T. 465-466).

locating and interviewing other inmates, such as "Sanchez," and inquiring as to the explanation for the presence of the brown paper bag in the cell where the body was found. However, this inquiry is easier said than done. In the case of the M Unit inmates there were only five (5) remaining out of the 67 names on the roster provided to defense counsel in September of 1980. (J.A. 90).

The Government, in its brief, has failed to suggest what remedy could neutralize the loss of so many potential witnesses on such a critical issue. Instead, it couches its position in the argument that it is the burden of the respondent to show that he has suffered substantial prejudice. Unfortunately, the Government does not suggest how respondent, while in segregation and while in transit from one location to another, could possibly have acquired sufficient information to make a showing as to what any of these 62 inmates might have said about the activities in and about M Unit on the date of Mr. Trejo's death. Similarly, it is possible that one or more of these individuals might have seen Michael Thompson ("Flappers") in the unit on the day of the murder.[9]

This is precisely the point recognized by the court of appeals. The presumption of prejudice is appropriately applied in these cases because it is impossible to prove or disprove prejudice because of the delay imposed by the Government and the failure to honor the request for counsel. The delay in seeking the indictment coupled with

---

[9] There is nothing in the record to suggest that the Government sought to inquire of the inmates in M Unit about the presence of Flappers and respondent could not. The information was not developed until counsel began to contact other inmates in respondent's unit in order to see if they remembered his being there on the day in question.) (R.T. 1878).

maintaining the respondents in segregation were acts totally within the control of the Government and cannot be attributed to the acts of the respondents.[10]

B. There Is Sufficient Evidence Of The Potential For Substantial Prejudice In The Record To Support The Dismissal Of The Indictment.

The Government questions whether the appellate court should have conducted an in depth review of the trial record in order to determine the presence or absence of evidence of demonstrative actual prejudice (Brief, p. 47) and they further assert that the trial evidence shows that in fact there was none. (Brief, p. 56). In support of the latter position they rely upon the number of witnesses produced, but ignore the quality of their testimony and the extent to which the Government prosecutor was able to impeach them on their lack of memory. Several of the witnesses produced by respondent testified in both trials and in many cases the transcripts of the first trial provide vivid evidence of the nature and extent of their failure of recollection. The Joint Appendix contains excerpts from some of the first trial testimony by Antonio Palacios,

---

[10] The Government has suggested that one way in which a suspect in segregation can preserve evidence in his favor is to "provide full information about his activities to F.B.I. investigators." (Brief, p. 36). In the case of respondent Gouveia, he did provide information about his activities to the F.B.I. One of the persons named was Steven Broughton. During the first trial Mr. Broughton was called as a witness. He was extensively cross-examined by the Government on his failure to precisely recall details of the events of November 11th. At one point he was asked, "Did you have any reason to believe or suspect that your account of these activities might be questioned two years down the road? His answer was, "No, I didn't." It appears that the Government did not seek to confirm or deny the information given by respondent about this witness. (J.A. 105).

Raymond Olvera, Stephen Broughton and Paul Leroy Allen.

It is particularly telling to consider the testimony of two of these witnesses. On cross-examination, Mr. Broughton was asked about the first time he saw respondent Reynoso on November 11th. He responded as follows: "Between 10:00 and 11:00. You keep asking me certain times, and how can I remember certain times over two years ago?" Mr. Deixler replied, "I can't imagine," and the witness responded, "I can't either." (J.A. 104). During his testimony Mr. Allen testified to seeing respondent Gouveia in K Unit and having a conversation with him, but the best he could do for a time frame was between the hours of 11:00 a.m. and 1:00 p.m. While the Government has characterized this witness and others as "alibi" witnesses, it is apparent that they were not very helpful because they could not recall with specificity either events or times. While it is true that the Government can argue that had these witnesses been interviewed at or near the time of the events they would have had clearer memories which might have eliminated them entirely as potential defense witnesses, it is also true that they may have been better witnesses and led the defense to more corroboration for their testimony. In either case, such arguments are based upon speculation born out of a lack of knowledge and this is exactly the point of the appellate court's conclusion that in these circumstances neither side can ordinarily prove or refute the existence of prejudice and therefore the court must decide in whose favor to "tip the scales." (Pet. App. p. 22a).

It is clear that the potential for substantial prejudice exists in these cases and that its existence is directly attributable to the conduct of the Government; therefore,

it seems only fair that the Government be the one who must establish an appropriate remedy to remove the taint, and they have not done so. Accordingly, dismissal of the indictment is the only remaining remedy.

CONCLUSION

Based upon the foregoing, respondent urges the court to affirm the decision of the court of appeals, thereby reversing the convictions and ordering the indictment dismissed.

Respectfully submitted,

Michael J. Treman
MICHAEL J. TREMAN
Attorney for Respondent
WILLIAM GOUVEIA